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7 **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**
8 **STATE OF WASHINGTON**

9 SCOTT CORNELIUS, PALOUSE
10 WATER CONSERVATION
11 NETWORK, and SIERRA CLUB
12 PALOUSE GROUP,

13 Appellants,

14 v.

15 WASHINGTON DEPARTMENT OF
16 ECOLOGY and WASHINGTON
17 STATE UNIVERSITY

18 Respondents.

PCHB No. 06-099

APPELLANTS' MOTION FOR
RECONSIDERATION OF THE
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

19 **I. Introduction**

20 Pursuant to WAC 371-07-450, Appellants move the Board for an order for
21 reconsideration of the Board's Findings of Fact, Conclusions of Law and Order (Final Order)
22 issued on April 17, 2008 in this matter. This motion is based on the points and authorities set
23 forth below.

24 **II. Motion for Reconsideration**

25 **1. Impairment.**

1 The Board’s opinion creates a new standard for determining whether
2 Ecology must establish a reasonable or feasible pump lift for an area. The opinion
3 overturns the holding in *Pair v. Ecology & Lehn Ranches*, PCHB 77-189 (1978), with
4 its conclusion that there must be evidence of a “realistic probability of interference or
5 interruption in the availability of water” before Ecology is required to “undertake a
6 reasonable or feasible pump lift determination.” *Final Order* p. 33. However, as the
7 *Pair* decision states, and the Board acknowledges, Ecology is required to set a
8 reasonable or feasible pump lift if a change will “have a detrimental effect upon a
9 lawful existing well” **or** “a substantial cumulative increase in pumping lift...” exists in
10 the area. *Id.* The Board’s new standard changes the “or” to an “and” thereby removing
11 an extremely valuable tool from Ecology’s ability to **prevent** impairment and water
12 mining. The outcome of this decision will mean well users will have to wait until the
13 well runs dry before receiving protection of their water rights. This result is contrary
14 to the laws and policies of Washington.

17 **a. The Board’s Decision Overturns Established Precedent and**
18 **Places Water Right Holders in Jeopardy**

19 As the dissent makes clear, there is precedent for denial of a permit by
20 Ecology if there is insufficient information regarding the source aquifer. The
21 foundation behind this premise is that, “[i]n large measure, the state water agency’s
22 function is prevention, not enforcement.” *Black Star Ranch & William Eckerich v.*
23 *Ecology*, PCHB No. 87-19 (1988). In order to practice prevention Ecology is required
24 to establish a reasonable or feasible pump lift in a situation where there is insufficient
25 information regarding the aquifer and there a substantial cumulative increase in pump
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1 lifts in the area. *See, Pair, supra, Black Star Ranch, supra, and Heer Brothers v.*
2 *Ecology & Schell*, PCHB Nos. 894 & 894-A (1976), *Graves v. Ecology and City of*
3 *Okanogan*, PCHB Nos. 88-140, 141 & 144 (1989), *Andrews v. Ecology*, PCHB No.
4 97-20 (1997). Appellants met this burden. In fact, the Board's decision repeatedly
5 mentions the dearth of relevant hydrological information for the Grande Ronde
6 Aquifer and the stark reality of its drastic decline. This decline is directly responsible
7 for a substantial and cumulative increase in pump lift.

9 **b. There is a Substantial Cumulative Increase in Pump Lift in the**
10 **Area and Relevant Hydrological Information Does Not Exist for**
11 **the Aquifer**

12 There is no debate that the Grande Ronde Aquifer is, and has been,
13 declining for nearly a century. The decline is impacting water users in area, forcing
14 the deepening of existing wells or drilling significantly deeper new wells. WSU
15 developed Well No. 7 to replace Wells 1, 3, and 4. *Final Order* p. 9. The reason for
16 replacement of these three shallow wells was WSU's expectation that they would
17 "eventually decrease in productivity, or fail." *Id.* These three wells were drilled to
18 depths of 247, 223, and 275 respectively. *Id.* at 6. In contrast, Well No. 7 is drilled to
19 a depth of 1,814 feet. *Id.* at 7. WSU's newest well, No. 8, is drilled to a depth of 812
20 feet. *Id.* at 7. In a race to the bottom of the aquifer, the deeper the well the less chance
21 there is of losing productivity or failing. Additionally, Appellant Scott Cornelius has
22 seen a decrease in his well of approximately 10 inches per year over the last fifteen
23 years. *Id.* at 19. Overall, hydrographs of the Grande Ronde Aquifer show water levels
24 have declined more "than 100 feet over the period of record." *Id.* at 21. This decline is
25 affecting wells across the entire basin. *Id.* Clearly, the evidence shows the Grande
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1 Ronde Aquifer is a declining aquifer and left unchecked will undoubtedly require
2 many well users to deepen their wells, as WSU has done, thereby increasing their
3 pump lift. As noted above, this will impact the entire basin.

4 Great uncertainty exists concerning the “extent and availability of
5 groundwater resources” in the Grande Ronde Aquifer. *Id.* at 20. In fact, there is so
6 little relevant information regarding the aquifer system that the Board concluded, it is
7 “impossible to predict with any degree of certainty how long the water in the GRA
8 will last.” *Id.* What is known about the aquifer points to an alarming future. The
9 recharge rate of the Grande Ronde Aquifer is “very low.” *Id.* at 21. The amount of
10 water being pumped from the aquifer is greater than the recharge. *Id.* Furthermore,
11 increases in aggregate pumping will “necessarily cause water-level declines within the
12 aquifer.” *Id.* As the Board’s decision shows, knowledge of the Grande Ronde Aquifer
13 is limited, but what is known leads to the conclusion that it is a system under extreme
14 distress.

15 The Board’s decision acknowledges the requirements necessary for Ecology
16 to establish a reasonable or feasible pump lift under the *Pair* line of cases are met in
17 this case. Faced with this evidence, however, the Board has decided to not require
18 Ecology to establish a pump lift, and instead crafted a new standard. The result is a
19 weakening of measures meant for the protection of the source and water users. The
20 reasonable or feasible pump lift standard is designed not to prevent new or change
21 applications, but to protect existing users. In fact, as precedent shows, applications are
22 processed after a reasonable or feasible pump lift is established. *See, Pair, et. al.*
23 *supra*. As a regulatory mechanism, the reasonable or feasible pump lift standard is not
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1 | overly burdensome or invasive. It strikes the proper balance between protecting
2 | existing water users and allowing continued development of the resource.

3 | The Board, by now requiring impairment before Ecology can set a
4 | reasonable or feasible pump lift, has created an unbalanced approach to groundwater
5 | management. The new standard will **create** impairment while the previous standard
6 | sought to prevent impairment. This is contrary to law and public policy. *See, Pair,*
7 | *Black Star Ranch, Heer, Shinn, et. al., supra*, and RCW 90.44.070, RCW 90.54.140.
8 | Appellants respectfully request the Board reconsider its decision regarding
9 | impairment.
10 |

11 | **2. Harm to Public Welfare**

12 | The issues of impairment and harm to the public welfare are closely linked.
13 | Once the Board determined there was no impairment it dismissed the public welfare
14 | issue in one sentence. *Id.* at 34. Apart from Appellants' arguments concerning
15 | impairment, other evidence was presented to the Board which it should have
16 | considered when analyzing harm to the public welfare. The undisputed facts regarding
17 | the long-term and continuing decline of the Grande Ronde Aquifer found in the
18 | Board's decision show a dramatic impact to the sole drinking water source for over
19 | 30,000 Washington residents. *Final Order* p. 3. The result of approval of the change
20 | applications will lead to increased pumping as predicted by WSU's Draft 2008 Water
21 | System Plan. *See, Appellants' Response to Ecology & WSU Motions for Summary*
22 | *Judgment*, 1st Williams Decl., Att. 7. The Board heard and accepted the testimony of
23 | Dr. Keller that continued increased aggregate pumping will exacerbate the continuing
24 | decline of water levels in the aquifer. *Id.* at 21. This is now happening.
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26 |

Therefore, Appellants respectfully request the Board reconsider its decision regarding harm to the public welfare.

III. Conclusion

For the foregoing reasons, Appellants respectfully request that the Board reconsider its findings with respect to the questions of whether Ecology was required to establish a reasonable or feasible pump lift and whether the change approval may lead to harm to the public welfare.

DATED this 25th day of April, 2008 at Seattle, Washington.

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Attorney for Appellants

/s/ _____
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/s/

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CERTIFICATE OF SERVICE

19 The undersigned certifies that on April 25, 2008, Appellants' Motion for
20 Reconsideration of the Board's Findings of Fact, Conclusions of Law and Order, was
21 served on the parties to this matter by mailing copies, via U.S. Mail, first-class postage
22 affixed, to the following addresses:

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6 I certify under penalty of perjury in accordance with the laws of the State of
7 Washington, that the foregoing is true and correct.

8 DATED this 25th day of April, 2008 at Seattle, Washington.

9 /s/
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